TB.

No. 0611429

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
MAY 17 2007
OFFICE OF THE CLERK

KEITH LAVON BURGESS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States Court of Appeals - Fourth Circuit @ Richmond

United States District Court - District of South Carolina

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Keith Burgess
(Signature)

RECEIVED
MAY 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 0611429

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

KEITH LAVON BURGESS,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
MAY 17 2007
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

P E T I T I O N

FOR A WRIT OF CERTIORARI

Petitioner:

KEITH LAVON BURGESS, pro se
FCI Estill #93479-071
Post Office Box 699
Estill, South Carolina 29918

On the Brief:

MICHAEL R. RAY, Law Clerk
Legal Assistant-Paralegal
FCI Estill #40860-019
Post Office Box 699
Estill, South Carolina 29918

QUESTION(S) PRESENTED

1. Whether the term "felony drug offense" as used in federal statute requiring imposition of enhanced mandatory minimum 20 years' imprisonment when drug offender has "prior conviction for a felony drug offense" must be read in pari materia with federal statutes defining both "felony" and "felony drug offense", so as to require imposition of minimum 20-year sentence only if prior drug conviction is both punishable by more than one year in prison and characterized as a felony by controlling law.

2. When the court finds that a criminal statute is ambiguous, must it then turn to rule of lenity to resolve ambiguity?

LIST OF PARTIES

1. Petitioner/Appellant: KEITH LAVON BURGESS, pro se, Register Number 93479-071, Federal Correctional Institution, Post Office Box 699, Estill, South Carolina 29918-0699.

2. Respondent/Appellee: UNITED STATES OF AMERICA, Arthur B. Parham, Esq. Office of the U.S. Attorney, Post Office Box 1567, Florence, South Carolina 29503-1567.

TABLE OF CONTENTS

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 3-4

REASONS FOR GRANTING THE PETITION..... 5-7

CONCLUSION..... 7

PROOF OF SERVICE..... 8

INDEX TO APPENDICES

APPENDIX A Decision of the Fourth Circuit Court of Appeals issued March 12, 2007

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
U.S. v. West, 393 F.3d 1302	5
Whalen v. U.S., 63 L.Ed.2d 715	6
United States v. Bass, 404 U.S. 336	6
McBoyle v. United States, 283 U.S. 25	6
Bifulco v. United States, 447 U.S. 381	6
United States v. Granderson, 511 U.S. 39	7
Chapman v. United States, 500 U.S. 453	7
STATUTES AND RULES	
21 U.S.C. § 802 et. seq.	2, 5, 6, 7
21 U.S.C. § 841, et. seq.	2, 5, 6, 7
21 U.S.C. § 846	3
21 U.S.C. § 851	4
OTHER	
Comprehensive Drug Abuse Prevention & Crime Control Act, of 1970	2
Violent Crime Control & Law Enforcement Act of 1994	2, 5

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit appears at Appendix "A" to the petition and has been designated for publication but is not yet reported.

JURISDICTION

The date on which the United States Court of Appeals for the Fourth Circuit decided this case was March 12, 2007. No petition for rehearing was filed in my case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 102(13,44), 401(b)(1)(A), as amended.

2. 21 U.S.C.A. §§ 802(13,44), 841(b)(1)(A).

3. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-222, tit. IX, § 90105, 108 Stat. 1796, 1987-88.

STATEMENT OF THE CASE

The Petitioner is one of two Defendants named in a two count indictment filed in the District of South Carolina on January 8, 2003. The charges allege that in or about October of 2002 and continuing thereafter, up to and including the date of the indictment, in the District of South Carolina and elsewhere, the Defendants Keith Lavon Burgess, a.k.a "Black" and Ronald Carl Soares did knowingly and willfully combine and conspire and agree and have a tacit understanding with each other and various other persons, both known and unknown to the Grand Jury, to unlawfully possess with intent to distribute and distribute 50 grams or more of cocaine base, commonly known as "crack" cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), all in violation of and 21 U.S.C. § 846. Count two is a substantive count that on or about December 17, 2002, in the District of South Carolina, the Defendants, Keith Lavon Burgess, a.k.a. "Black" and Ronald Carl Soares, knowingly, intentionally, and unlawfully did possess with intent to distribute and did distribute 50 grams or more of cocaine base, commonly known as "crack" cocaine, a schedule II controlled substance and did aid and abet each other in the commission of the aforesaid offense, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2.

On February 2, 2003, an Information was filed by the Assistant United States Attorney, pursuant to 21 U.S.C. § 841 to increase the Petitioner's mandatory minimum from 10 years to 20 years. On March 22, 2003, the Petitioner appeared in the United States District Court in Florence, South Carolina and entered a plea of guilty to count one of the indictment before the Honorable Terry L.

Wooten, United States District Court Judge. The Pre-Trial Services Report, dated May 10, 2003, was prepared. On April 20, 2004, Assistant United States Attorney A. Bradley Parham advised the Probation Office that an Information had been filed with the District Court pursuant to 21 U.S.C. § 851 to enhance the Petitioner's statutory mandatory minimum to 20 years. On April 20, 2004, the Presentence Investigation Report was revised by the Probation Officer. On May 5, 2004, the Petitioner objected to ¶¶'s 74 and 75 of the Revised Presentence Investigation Report in which the mandatory minimum term of imprisonment was increased to 20 years pursuant to 21 U.S.C. § 851. Thereafter, on May 12, 2004, the Petitioner filed an additional objection to the 21 U.S.C. § 851 enhancement. On June 10, 2004, the Probation Officer issued a revised addendum to the Presentence Investigation Report responding to the Petitioner's objections.

At sentencing, the Court overruled Petitioner's objection to the application of 21 U.S.C. § 851 which increased the mandatory minimum to 20 years.

The Petitioner received a downward departure at sentencing due to substantial assistance pursuant to United States Sentencing Guidlines § 5K1.1. The Petitioner was sentenced, pursuant to the United States Sentencing Guidelines, to a sentence of 156 months to run consecutive to his supervised release violation.

Petitioner filed a direct appeal, citing this issue to the Fourth Circuit Court of Appeals at Richmond. On March 12, 2007, a three judge panel of that court issued a published opinion, authored by Judge Shedd, in which they affirmed the conviction and sentence. This instant petition for writ of certiorari is the result of that decision.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(a) allows review on a writ of certiorari when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter. In the case at bar, the Petitioner clearly shows that the Fourth Circuit Court of Appeals has issued just such a decision. The United State Court of Appeals for the DC Circuit issued a completely opposite decision on January 7, 2005 in the matter of U.S. v. West, 393 F.3d 1302. In the instant case, the Fourth Circuit basically found that the statutory language was not ambiguous. Looking at both the language and structure of the VCCLEA, the Petitioner contends that § 841(b)(1)(A) must be construed by reference to both § 802(13) and § 802(44). Petitioner argues that § 841(b)(1)(A) plainly refers only to "felony" drug convictions, so the definitional provision under both § 802(13) and § 802(14) appear to apply. The Petitioner would also remind this Court that, under well-established case law, a court must always strive to interpret statutes to give meaning to all provisions and to achieve coherent and consistent results. Following these principles, the Petitioner argues that the phrase "prior conviction for a felony drug offense" in § 841(b)(1)(A) must be read in pari materia with the definition of "felony" in § 803(13) and the definition of "felony drug offense" in § 802(44). Pursuant to this reading, the 10-year § 841(b)(1)(A) enhancement applies only when a defendant's prior conviction is (1) classified as a felony by applicable state or federal law and (2) punishable by more than a year in prison.

To resolve this circuit conflict, this Court must first decide whether the 1994 amendments manifest an unambiguous intent on the part of Congress to broaden the applicability of the disputed enhancement provision. If you find the statute ambiguous on this point, the Court must turn to the rule of lenity to resolve the dispute. See Whalen v. U.S., 63 L.Ed.2d 715. This is so because, in the criminal context, (your) assessment of the meaning of any particular statute is informed by "two policies that have long been a part of our tradition." United States v. Bass, 404 U.S. 336.

This Court must decide that "fair warning...be given... in language that the common world will understand, of what the law intends to do if a certain line is passed." Id. (quoting McBoyle v. United States, 283 U.S. 25,27 (1931)). "Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community" we require that legislatures, not courts, define criminal activity. Bass, 404 U.S. at 348. In short, Congress must be precise in providing fair notice of the specific criminal activity that is prohibited, as well as the punishment that will be imposed if the prohibition is violated. These policies find expression in the rule of lenity. This Court has emphasized that the touchstone of the rule of lenity is statutory ambiguity. Bifulco v. United States, 447 U.S. 381.

The question at hand is not simply whether the language of § 802(44) defines "a prior conviction for a felony drug offense", but rather, whether there is any language in that or any other provision of the Act plainly stating that § 802(44) alone gives meaning to those words as they are used in § 841(b)(1)(A). There is not. To the extent that this argument persuades you that the matter is not entirely free of doubt, the doubt must be resolved in favor of

lenity." Whalen.

In these circumstances -- where text, structure, and history fail to establish that the Government's position is unambiguously correct -- we apply the rule of lenity and resolve the ambiguity in the [Petitioners] favor." United States v. Granderson, 511 U.S. 39.

In the case at bar, a ruling in favor of the Petitioner is required, not only to resolve this case, but to provide guidance and clarity to the other Circuits and the public at large. At present, the statute(s) are much less than clear on the subject, which has created the circuit conflict at hand.

After the application of "every thing from which aid can be derived, [you are] still left left with an ambiguous statute." Chapman v. United States, 500 U.S. 453.

In the face of such grievous ambiguity, the more lenient interpretation controls.

CONCLUSION

The petition for writ of certiorari should be granted, and counsel should be appointed to represent this Petitioner to present oral argument to this Court.

Respectfully submitted,

Dated: May 20, 2007

By: Keith Burgess

KEITH LAVON BURGESS, pro se
FCI Estill #93479-071
Post Office Box 699
Estill, South Carolina 29918

On the Brief:

MICHAEL R. RAY, Law Clerk
FCI Estill #40860-019
Post Office Box 699
Estill, South Carolina 29918

PROOF OF SERVICE

I, KEITH LAVON BURGESS, do swear that on this the 17 day of May, 2007, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding, and on every other part required to be served, by depositing an envelope containing the above documents in the United States Mail, properly addressed to each of them, with First Class Mail postage prepaid, addressed as follows:

Mr. A. Bradley Parham, Esq.
Assistant United States Attorney
Post Office Box 1567
Florence, South Carolina 29503-1567

I declare under the penalty of perjury that the foregoing is true and correct, in accordance with 28 U.S.C. § 1746.

Executed on May 17, 2007

By: Keith Burgess
KEITH LAVON BURGESS